

4-3.000 COMPROMISING AND CLOSING

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4-3.100

Authority of the Attorney General

The Attorney General has the inherent authority to dismiss any affirmative action and to abandon the defense of any action insofar as it involves the United States of America, or any of its agencies, or any of its agents who are parties in their official capacities. *See Confiscation Cases*, 7 Wall. 454, 458 (1868) (action brought by an informer with expectation of financial gain); *Conner v. Cornell*, 32 F.2d 581, 585-6 (8th Cir.), *cert. denied*, 280 U.S. 583 (1929) (dismissal of suit on behalf of restricted Indian wards of the United States); *Mars v. McDougal*, 40 F.2d 247, 249 (10th Cir.), *cert. denied*, 282 U.S. 850 (1930); 22 Op. Att'y Gen. 491, 494; 38 Op. Att'y Gen. 124, 126; *see United States v. Throckmorton*, 98 U.S. 61, 70 (1878); *United States v. Newport News Shipbuilding & Dry Dock Co.*, 571 F.2d 1283 (4th Cir.), *cert. denied*, 439 U.S. 875 (1978). This authority may be exercised at any time during the course of litigation.

The Attorney General also has the inherent authority to compromise any action insofar as it involves the United States of America, its agencies, or any of its agents who are parties in their official capacities. *See Halbach v. Markham*, 106 F. Supp. 475, 479-480 (D.N.J. 1952), *aff'd*, 207 F.2d 503 (3rd Cir. 1953), *cert. denied*, 347 U.S. 933 (1954); 38 Op. Att'y Gen. 124, 126. This authority is not dependent upon any express statutory provision. *See* 38 Op. Att'y Gen. 98, 99. To the contrary, it exists to the extent that it is not expressly limited by statute. *See Swift & Co. v. United States*, 276 U.S. 311, 331-2 (1928).

Note the additional authority delegated to the Attorney General by the second paragraph of section 5 within Executive Order 6166.

4-3.110 Delegations of the Attorney General's Authority to Compromise and Close

The Attorney General has delegated settlement authority in civil cases to the several Assistant Attorneys General and certain other officials. The controlling regulations, found at 28 C.F.R. § 0.160, *et seq.*, should be consulted before authorization is sought to compromise or close a case, but it may be helpful to note that generally:

- A. The Assistant Attorney General for the Civil Division can compromise an affirmative claim when the difference between the gross amount of the original claim and the proposed settlement does not exceed \$2 million or 15% of the original claim, whichever is greater, 28 C.F.R. §§ 0.160(a)(1), 0.169;
- B. He/she can compromise (or settle administratively) a defense claim when the principal amount of the proposed settlement does not exceed \$2 million, 28 C.F.R. § 0.160(a)(2).
- C. He/she can compromise all nonmonetary cases, 28 C.F.R. § 0.160(a)(3);
- D. He/she can reject most offers, 28 C.F.R. § 0.162;
- E. He/she can close (other than by compromise or by entry of judgment) an affirmative claim when the gross amount of the original claim does not exceed \$2 million, 28 C.F.R. §§ 0.164, 0.169;
- F. The Solicitor General must approve compromise in all Supreme Court cases and in many other appellate matters, 28 C.F.R. § 0.163;
- G. The compromising or closing of cases beyond these limits must be approved by the Deputy Attorney General, or Associate Attorney General, as appropriate, 28 C.F.R. §§ 0.160(c), 0.161, 0.164(b), 0.165, 0.167; and
- H. The Deputy Attorney General or Associate Attorney General, as appropriate, is further specifically authorized to exercise the settlement authority of the Attorney General as to all affirmative and defensive civil claims, 28 C.F.R. § 0.161(b).

4-3.120 General Redelegation of the Attorney General's Authority to Compromise and Close

The Assistant Attorney General for the Civil Division has redelegated portions of the Attorney General's authority to United States Attorneys, and also to Deputy Assistant Attorneys General, branch directors, the Director of the Appellate Staff, the Director of the Office of Foreign Litigation, the Director of the Office of Consumer Litigation, the Director of the Office of Immigration Litigation, and Attorneys-in-Charge of field offices of the Civil Division. Civil Division Directive No. 14-95, published in the Appendix to Subpart Y immediately following 28 C.F.R. § 0.172, 60 Fed. Reg. 17456 (1995), presently details those redelegations. *See* Civil Division Directive No. 14-95, 28 C.F.R. Part 0.

While the United States Attorneys should study that published Directive before compromising, closing, or seeking authorization for the compromising or closing of a civil claim, it may be generally said that, subject to the exceptions noted in USAM 4-3.140:

A. The Deputy Assistant Attorneys General of the Civil Division are authorized to act for, and to exercise the authority of, the Assistant Attorney General with respect to the institution of suits, and acceptance or rejection of compromise offers, and the closing of claims or cases, unless any such authority is required by law to be exercised by the Assistant Attorney General personally or has been specifically delegated to another Department official.

B. Civil Division Branch, Office and Staff Directors, and Attorneys in charge of field offices, are authorized, with respect to matters assigned to their respective components, (and subject to 28 C.F.R. §§ 0.160(c), and 0.164(a) and section 4 of Directive 14-95, and the authority of the Solicitor General set forth in 28 C.F.R. § 0.163), to reject any offer in compromise, to accept offers in compromise against the United States where the amount to be paid by the United States does not exceed \$500,000, or to accept offers in compromise on behalf of the United States, or close cases, where the gross amount of the original claim does not exceed \$500,000, or where the gross amount of the original claim was between \$500,000 and \$5,000,000, so long as the difference between the gross amount of the original claim and the proposed settlement does not exceed \$500,000 or 15 percent of the original claim, whichever is greater.

C. United States Attorneys may reject any offer in compromise, accept offers in compromise against the United States where the amount to be paid by the United States does not exceed \$1 million, or accept offers in compromise on behalf of the United States, or close cases, where the gross amount of the original claim does not exceed \$1 million, or where the gross amount of the original claim does not exceed \$5 million and the difference between the gross amount of the original claim and the proposed settlement does not exceed \$1 million or 15 percent of the original claim, whichever is greater.

4-3.130 Ad Hoc Redelegations of the Attorney General's Authority to Compromise and Close

By virtue of section 4(b) of Directive 14-95, upon the recommendation of the appropriate Director, the Assistant Attorney General for the Civil Division may delegate to United States Attorneys any claims or suits involving amounts up to \$5 million, where the circumstances warrant such delegation. *See* Civil Division Directive No. 14-95, 28 C.F.R. Part 0.

All delegations pursuant to section 4(b) must be in writing, and no United States Attorney has authority to compromise or close any such redelegated case or claim except as is specified in the required written redelegation or in section 1(c) of the Directive. The limitations of section 1 of the Directive, discussed at USAM 4-3.140, also remain applicable in any case or claim redelegated under section 4(b). *See* Civil Division Directive No. 14-95, 28 C.F.R. Part 0.

4-3.140 Exceptions to the Redelegation of the Attorney General's Authority

By virtue of section 1 of Directive 14-95 and notwithstanding the redelegations of authority to compromise cases, file suits, counterclaims, and cross-claims, or to take any other action necessary to protect the interests of the United States discussed above, such authority may not be exercised, and the matter must be submitted to the Assistant Attorney General for the Civil Division, when:

A. For any reason, the proposed action, as a practical matter, will control or adversely influence the disposition of other claims totaling more than the respective amounts designated;

- B. Because a novel question of law or a question of policy is presented, or for any other reason, the proposed action should, in the opinion of the officer or employee concerned, receive the personal attention of the Assistant Attorney General;
 - C. The agency or agencies involved are opposed to the proposed action (the views of an agency must be solicited with respect to any significant proposed action if it is a party, if it has asked to be consulted with respect to any such proposed action, or if such proposed action in a case would adversely affect any of its policies);
 - D. The United States Attorney involved is opposed to the proposed action and requests that the decision be submitted to the Assistant Attorney General for decision, or
 - E. The case is on appeal, except as determined by the Director of the Appellate Staff.
- See Civil Division Directive No. 14-95, 28 C.F.R. Part 0.*

4-3.200 Bases for the Compromising or Closing of Claims Involving the United States

A United States Attorney should compromise or close a claim (the term "claim" is used in its broadest sense to include, for example, a claim that arises out of a judgment entered for or against the United States) pursuant to the authority described in USAM 4-3.120 only when one or more of the following bases for such action are present:

- A. The United States Attorney believes that a claim of the United States is without legal merit (*see* 16 Op. Att'y Gen. 248 (1879); 23 Op. Att'y Gen. 631 (1902); 38 Op. Att'y Gen. 98 (1934));
- B. The United States Attorney believes that a claim of the United States cannot be factually proven in court (*see* 16 Op. Att'y Gen. 259 (1879); 23 Op. Att'y Gen. 631 (1902); 38 Op. Att'y Gen. 98 (1934));
- C. The United States Attorney believes that a different claim of the United States should be selected for the purpose of resolving an open issue of law;
- D. The United States Attorney believes that the full amount of a claim of the United States cannot be collected in full due to the financial condition of the debtor.
 - 1. There must be a real doubt as to the government's ability to collect in full. *See* 12 Op. Att'y Gen. 543 (1868); 16 Op. Att'y Gen. 248 (1879); 16 Op. Att'y Gen. 259 (1879); 36 Op. Att'y Gen. 40 (1929).
 - 2. Uncertainty as to the price which property will bring on execution sale may be treated as an uncertainty as to collection. *See* 38 Op. Att'y Gen. 194 (1935). However, claims secured by a mortgage should not be compromised until after sale of the mortgaged property, since the government is generally entitled to both the amount the property will sell for and a deficiency judgment. In the rare instance in which such a compromise may be appropriate, a thorough appraisal by an impartial appraiser is indicated, to determine the value of the mortgaged property and avoid criticism from those who may later say they would have offered more for the property.
 - 3. A valid and provable claim, which can be collected, cannot be voluntarily relinquished. *See* 16 Op. Att'y Gen. 248 (1879); 21 Op. Att'y Gen. 50 (1894); 36 Op. Att'y Gen. 40 (1929).
 - 4. Compromise requires some mutuality of concession. There must be room for the play of give and take. *See* 16 Op. Att'y Gen. 248 (1879); 23 Op. Att'y Gen. 18 (1900); 36 Op. Att'y Gen. 40 (1929); 38 Op. Att'y Gen. 94 (1933). The adequacy of the concession is to be determined by the exercise of sound discretion. *See* 38 Op. Att'y Gen. 98 (1934).
 - 5. Hardship, which does not involve inability to pay, is not a proper basis for settlement. *See* 23 Op. Att'y Gen. 18 (1900); 38 Op. Att'y Gen. 94 (1933).

- E. The United States Attorney believes that the cost of collecting a claim in favor of the United States will exceed the amount recoverable (*see* 4 C.F.R. § 103.4);
- F. The United States Attorney believes that compromising or closing a claim of the United States is necessary to prevent injustice (*see* 38 Op. Att'y Gen. 98 (1934); 38 Op. Att'y Gen. 94 (1933));
- G. The United States Attorney believes that the enforcement policy underlying a claim of the United States will be adequately served by a compromise (*see* 17 Op. Att'y Gen. 213 (1881); 29 Op. Att'y Gen. 217 (1911); 31 Op. Att'y Gen. 459 (1919); as restricted by 21 Op. Att'y Gen. 264 and 36 Op. Att'y Gen. 40);
- H. The United States Attorney believes that it is less costly to compromise a claim against the United States than to undertake further legal action in defense against the claim; or
- I. The United States Attorney believes that a compromise of a claim against the United States is substantially more favorable than the verdict or judgment that would probably result from further litigation.

4-3.210 Compromising Claims Against a Going Business Concern

If a compromise with a going business concern necessitates the acceptance of payments over a period of time, the United States Attorney should obtain adequate security for deferred payments. It is also generally advisable for the United States Attorney to require a waiver of any and all claims which such a business concern has against the United States, including rights under the net operating loss carry forward and carry back provisions of the Internal Revenue Code, at least insofar as these are affected by the compromise proposal. In some situations, it may be advisable to require written consent for the audit of the concern's books and records. Consideration should also be given to having an independent appraisal of business assets as "forced sale" and "fair market" value, conducted at the concern's expense by an appraiser whose selection is subject to the approval of the United States Attorney. The United States Attorney should not accept a percentage of net profits in settlement or partial settlement of a claim. Cf. 4 C.F.R. § 103.9. Such arrangements are speculative at best; policing is difficult; and there are too many ways in which the affairs of the debtor concern can be manipulated to avoid, minimize, or postpone realization of a net profit. Corporate stock should generally not be accepted in settlement or payment of a claim in favor of the United States. *Id.* Managing such stock holdings places unusual burdens on client agencies. Letters of credit provide an excellent method for securing payment.

4-3.220 Claims in Conjunction With Bankruptcy Code Proceedings

A United States Attorneys' acceptance of a plan for reorganization under the Bankruptcy Code amounts to the compromise of a claim in favor of the United States and is governed by the same limitations and standards. For purposes of determining the United States Attorneys' authority to accept a plan, the term gross amount of the original claim as used in Civil Division Directive No. 14-95, 60 Fed. Reg. 17456 (1995), means liquidation value. Liquidation value is the forced sale value of the collateral, if any, securing the claims plus the dividend likely to be paid for the unsecured portion of the claims in an actual or hypothetical liquidation of the bankruptcy estate. If the debtor fails to provide the information needed to consider the plan, or if inadequate time is allowed to obtain any required Department of Justice approvals for the compromise, the United States Attorney should file an objection to the plan with the bankruptcy court.

4-3.230 Bases for Closing Claims Arising Out of Judgments in Favor of the United States by Returning Those Claims to the Client Agencies

Claims arising out of judgments in favor of the United States which cannot be permanently closed as uncollectible (*see* USAM 4-3.200) should be returned to the referring federal agency whenever:

- A. All other claims arising out of the same transaction have also been reduced to judgment;
- B. All monies collectible upon the claim(s) are payable to a single referring federal agency; and
- C. The claim is uncollectible except by installment payments which debtors agree to make to the referring agency, or the claim can be enforced by other means, but such enforcement is forborne in consideration of the promise for installment payments; or the claim is presently uncollectible but has future collection potential, and the United States Attorney is not in a better position than the agency to keep the matter under surveillance.

Return is also subject to the following caveats:

- A. The United States Attorney should be satisfied that, as a practical matter, the transfer will not adversely affect the chances of collection or the amount that will be collected.
- B. The agency must be willing to accept the transfer and must understand that it is not authorized to undertake final settlement, reduction, or release of any unpaid balance without the specific authorization of the Department of Justice, and all judicial proceedings to enforce or release judgments are to be conducted by the United States Attorney; and
- C. The United States Attorney should consider it unlikely that the claim will be returned to him/her for further proceedings.

4-3.231 Monitoring of Payment Agreements by the Department of Veterans Affairs Debt Management Center (DMC)

In the event a payment agreement is reached, either prior to, or after, judgment in a case involving a Department of Veterans Affairs (VA) educational allowance claim, the United States Attorney may utilize the VA's Debt Management Center (DMC) in St. Paul, Minnesota, to monitor the payments and close the file pursuant to USAM 4-3.230. Guidance on using the DMC can be found in the Civil Resource Manual at 227.

4-3.300 Memoranda by United States Attorney Explaining the Compromising or Closing of Claims Within the United States Attorney's Authority

Whenever a United States Attorney compromises or closes a claim involving the United States, pursuant to the authority as described in USAM 4-3.120 and 4-3.130, he/she should place a memorandum in the office file fully explaining the basis for the action. A copy of this memorandum should be sent to the appropriate branch of the Civil Division. This requirement is set forth at § 2(a) of Civil Division Directive No. 14-95, published in the Appendix to Subpart Y immediately following 28 C.F.R. § 0.172, 60 Fed. Reg. 17456 (1995).

4-3.320 Memoranda Containing the United States Attorney's Recommendations for the Compromising or Closing of Claims Beyond His/Her Authority

The compromising of cases or closing of claims which a United States Attorney is not authorized to approve should be referred to the Civil Division official having the requisite approval authority. The referral memorandum should contain a detailed description of the matter, the United States Attorney's recommendation, and a full statement of the reasons therefor. This requirement is set forth at § 2(b) of Civil Division Directive No. 14-95, *supra*.

4-3.400 Consummation of Compromise of Claims of the United States -- Generally

When a claim of the United States is compromised, the compromise should be effected and evidenced in the manner provided in USAM 4-3.300, *et seq.* No further evidence of settlement should be required, although a written settlement agreement between the debtor and the United States Attorney should be prepared. That agreement should be specifically limited to the immediate subject matter of the claim which was in fact compromised. In no case should a general release be issued to the debtor, since it is not possible to know whether the debtor owes debts to other agencies such as the Internal Revenue Service. If a compromise cannot be effected without the execution of a release, the release should be narrowly drawn, limited to the specific debt that is compromised, and should contain a specific reservation of the United States' right to proceed against other obligors.

If the compromise is made for the purpose of clearing title to a particular property, the release executed should be limited to the release of the United States' judgment lien or right of redemption as to that specific property. No release of a lien or a right of redemption should be executed without some appropriate consideration, even if the claim is questionable. If a compromise is effected with less than all obligors, care should be taken to reserve the United States' right to proceed against, or collect from, the others. A covenant not to sue, containing a specific reservation of such right, is preferable to a release (even when specifically limited) in this situation.

4-3.411 Issuance of a Receipt Where Suit Has Not Been Filed

When a compromise proposal has been accepted, and the consideration therefor has been received, no further action is required to consummate the compromise if suit has not been filed. The agency should be contacted in order to issue an IRS Form 1099-G as appropriate.

4-3.412 Dismissal Where Suit Has Been Filed

If a compromise is agreed to in a case in which the United States has filed suit, dismissal of the suit with prejudice is all that is required to evidence the settlement. If the settlement is to be paid in installments, judgment may be entered, with the defendant's permission, as security for the deferred installments. However, if this procedure has not been agreed upon as part of the compromise arrangement, and it is necessary to dismiss the suit, the dismissal should be without prejudice. *See* Fed. R. Civ. P. 41(a). Tort suits brought on behalf of the United States should not be dismissed in such circumstances without a written waiver of limitations, since partial payments do not toll the running of the statute of limitations.

4-3.420 Consummation of Compromise of Judgments in Favor of the United States

If the United States' claim has been reduced to judgment, and the settlement is intended by both parties to satisfy the judgment obligation in full, a satisfaction of judgment should be filed upon full payment by the debtor under the compromise. This should be sufficient to evidence the consummation of settlement. However, if more than one obligor is bound by the judgment and the settlement is only as to one obligor's debt, only a partial satisfaction of the judgment can be executed. It is appropriate to release the judgment lien as to the settling debtor's property, but not as to the property of the nonsettling debtors.

4-3.430 Payment of Compromises -- Compromise Payable by Client Agency or Insurer

In a limited number of instances, compromises may be payable by an insurer, surety, title insurance company, or indemnitor. In such cases, the client agency should be asked to arrange for payment, or, with the agency's acquiescence, arrangements for payment can be made directly with the insurer, surety, or indemnitor. Some "sue and be sued" officials or agencies can pay claims from appropriations or revolving funds. In such cases, payment should be obtained from the client agency. It is preferable that compromises of claims arising out of the operations of certain government corporations and the shipping operations of the Maritime Administration be handled in the same manner as claims in favor of the government. Should circumstances warrant, these claims may be compromised by entry of an order approving the compromise.

Compromises of suits under the Tucker Act (28 U.S.C. § 1346(a)(2)) and the Suits in Admiralty Claims Act (46 U.S.C. § 741, *et seq.*) may, in unusual circumstances, be payable from appropriated funds of the client agency. However, generally it will be necessary to enter a consent judgment upon compromise, in order to obtain payment. Compromise of suits involving minors and other persons under legal disability, or by executors or administrators, should be approved by the local probate, orphan's, surrogate's, or other court of competent jurisdiction, where such approval is required by applicable state law. It is preferable that the amount of proper attorneys' fees which are to be paid from the settlement proceeds be specified in the settlement agreement. If this is not done, a separate check cannot be issued payable to the attorney. Arrangements should be made for all payments of compromises to be made through the USAO, in order that the check may be exchanged for dismissal of suit with prejudice, or an appropriate release or covenant not to sue.

4-3.432 Payment of Compromises -- Federal Tort Claims Act Suits

Compromises of suits in excess of the United States Attorneys' delegated authority must receive explicit and advance approval through the Civil Division of the Department of Justice, regardless of whether or not the case otherwise has been delegated for direct handling to the USAO. A memorandum setting forth the basis for the compromise should be forwarded to the Civil Division along with all material, including pleadings, necessary to understand the litigation and the basis for the settlement. Thereafter, the USAO will be advised of the action taken on the recommendation of the settlement.

After approval, the settlement agreement may be forwarded by the United States Attorney directly to the Department of the Treasury (or, 1. in Postal Service cases, to the Postal Service; or 2. in Federally Supported Health Center cases, to HHS). Compromises in suits under the Federal Tort Claims Act, the Suits in Admiralty Act or the Public Vessels Act, are payable in the same manner as judgments. In no event should the settlement be forwarded to Treasury, the Postal Service, or HHS prior to approval from the Justice Department, except when cases are settled within the United States Attorneys' delegated authority.

See Section USAM 4-10.000 of this manual for the letters and forms to be used when sending compromises or settlements to the Treasury, the Postal Service, or HHS for payment.

